Supreme Court, U.S.
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No. 96-568

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ONCALE,

Petitioner,

versus

SUNDOWNER OFFSHORE SERVICES, INCORPORATED; JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether same-sex (male-on-male) sexual harassment claims are actionable under the Civil Rights Act, Section 703(a) of Title VII and 42 U.S.C.§ 2000(e)-2(a)(1).

2. Whether the United States Court of Appeals for the Fifth Circuit erred as a matter of law in holding that same-sex sexual harassment claims are not cognizable under Title VII.

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The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 83 F.3d 118 and is reproduced in the Joint Appendix. The order of the United States Court of Appeals for the Fifth Circuit denying the suggestion for rehearing *en banc* is not reported and is reproduced in the Joint Appendix. The Judgment of the United States District Court for the Eastern District of Louisiana is reproduced in the Joint Appendix. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 67 Fair Empl. Prac. Cas. (BNA) 769 and is reproduced in the Joint Appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1996. Joseph Oncale's petition for rehearing and suggestion for rehearing *en banc* was denied on July 12, 1996. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1). Petitioner timely filed his petition for writ of certiorari on October 9, 1996 which was granted by the Court on June 9, 1997.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

A. Procedural History

Through complaint for damages filed in the United States District Court for the Eastern District of Louisiana on May 5, 1994, Joseph L. Oncale advances a same-sex sexual discrimination action against Sundowner Offshore Services, Inc., Oncale's payroll employer at the time of the alleged harassment, and three male co-workers, John Lyons, Danny Pippen and Brandon Johnson. Joseph Oncale alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1), and seeks remedies and relief as provided for under law. In response, the defendants filed a general denial and, ultimately, a summary judgment motion, challenging Joseph Oncale's right to advance a male-on-male sexual harassment claim under Title VII. The Employer's summary judgment motion was heard in the District Court on March 8, 1995.

Through Judgment entered March 24, 1995, the Honorable G. Thomas Porteous, Jr., United States District Judge, granted summary judgment in favor of the defendants. Finding the Fifth Circuit, through *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994), had

"clearly articulated its position that same-sex harassment does not state a claim under Title VII," the District Court concluded Mr. Oncale, a male, could not, as a matter of law, advance a cause of action under Title VII for harassment by male co-workers. Further, the District Court observed that defendants Pippen and Johnson could not be considered Oncale's "employers" under Title VII. A timely appeal followed.

On May 20, 1996 the Fifth Circuit affirmed the trial court's summary judgment determination, holding that same-sex sexual harassment is not cognizable under Title VII. In response, Joseph Oncale requested rehearing and reconsideration of the matter *en banc*. This effort to obtain reconsideration of the Fifth Circuit's categorical rejection of same-sex sexual harassment claims under Title VII failed and petition to this Court followed.

B. Background Facts

Mr. Oncale's claim arises out of a series of events that occurred during his employment as a roustabout assigned to an off-shore drilling location with Sundowner Offshore Services between August and November of 1991.[1] Joseph

[1] Oncale was hired through Sundowner's Houma Louisiana office and worked "seven days on, seven days off" on Chevron USA's Ship Shoal 266-A platform. During his shift, Mr. Oncale worked on Platform A and stayed in the crew's quarters located on Platform B. At all relevant times, Oncale's crew consisted of John Lyons, crane operator, Danny Pippen, driller, Brandon Johnson, roughneck, a derrick hand and two other roustabouts.

Oncale was denied his civil and employment rights in violation of law, as over a number of weeks he was sexually assaulted, battered, touched, and threatened with rape by his direct supervisor, John Lyons, and a second supervisor, Danny Pippen, who, as a driller for Sundowner, exercised de facto control over the terms and conditions of Oncale's employment. The third individual defendant, Brandon Johnson, a co-worker with no apparent supervisory authority, assisted John Lyons in one of the attacks.[2]

Mr. Oncale, who suffered several direct, sexual assaults and innumerable threats of continuing sexual abuse and who twice reported the situation to his

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[2] The facts testified to by Joseph Oncale, which must be accepted as true for purposes of Sundowner's summary judgment motion and this appeal, are that on October 25, 1991 Danny Pippen grabbed and held Oncale as the crew was being transported by boat from Platform A to Platform B. John Lyons then removed his penis from his pants and placed it on the back of Oncale's head. As Oncale struggled to free himself Lyons said he was going to "f . . . (Oncale) in the behind." The sexual harassment continued.

The next morning, as the crew was being lifted onto Platform A in a personnel basket, Brandon Johnson grabbed and restrained Oncale to facilitate another sexual assault by Lyons. During this attack Lyons again removed his penis from his pants, this time placing it on Oncale's arm and again assuring Oncale that he would have to submit to these sexual advances.

The sexual assaults continued as the crew returned to their quarters on October 26, 1991. As Oncale was taking a shower, Pippen and Lyons got into the shower stall with Oncale. Pippen pinned Oncale as Lyons inserted a bar of soap into "the cheeks of his (Oncale's) behind." As they held Oncale both men, Pippen and Lyons, assured Oncale that they were going to "f . . . (Oncale) in the behind."

employer's highest ranking representative on the job site to no avail, was forced to quit his employment as he feared that were he to stay he "would be raped or forced to have sex."[3] J.A. 70-72. The facts of the vulgar and violent actions of the individual defendants and the circumstances under which Joseph Oncale reported the sexual harassment to his toolpusher and safety director were fully submitted to the Trial Court in response to the summary judgment motion. J.A. 74-80. The summary judgment record also includes the admission by Brandon Johnson that he restrained Joseph Oncale while John Lyons said he was going to put his penis on Oncale.

The background facts, thus, are that Mr. Oncale's immediate supervisors, John Lyons, and another supervisor, Danny Pippen, who had *de facto* control over the conditions of his employment, physically restrained him on two occasions while John Lyons placed his penis on Mr. Oncale's head and arm. The supervisors further violated Oncale sexually on a third occasion when John Lyons attacked Mr. Oncale in the showers and forced a bar of soap into Mr. Oncale's anus while Danny Pippen held Mr. Oncale. The supervisors attacked Joseph Oncale both in the designated work areas of the rig while Mr. Oncale was on duty and in the showers/living quarters, repeatedly assuring Oncale that they desired and intended sexual intercourse and that they would continue with their assaults as long as Mr. Oncale remained employed on the Sundowner rig. The Safety Director and

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[3] After each of the sexual attacks Oncale reported the events to Valent Hohen, Jr. Safety Compliance Clerk for Sundowner. Hohen refused to take any action.

Toolpusher, the highest ranking employees of Sundowner on the rig, were fully informed of the sexual assaults and harassment but did nothing to halt the repeated sexual threats and sexual battery. Instead, Mr. Lyons assured Joseph Oncale that his reporting of the sexual harassment would not bring an end to the ordeal. The pattern of violent harassment eventually forced Oncale to quit his employment. On November 10, 1991 Sundowner's Safety Compliance Officer signed a Separation Notice which identifies the reason for leaving as: "Voluntary Leaving due to sexual harassment and verbal abuse."

The deposition testimony of Danny Pippen is that he grabbed Joseph Oncale "on his butt occasionally." J.A. 93. Mr. Pippen then acknowledged that the sexual assaults complained of did not constitute "horseplay" within the community of offshore laborers. J.A. 97. Further, Danny Pippen admits that, as a driller, he had authority to direct and terminate Mr. Oncale's employment. J.A. 92-100.

SUMMARY OF THE ARGUMENT

Discrimination "because of sex", as it has evolved through the administrative process, and this Court's recognition of sexual harassment as a form of sex discrimination, is more than gender-driven denial of specific employment opportunities. Title VII prohibits conduct of an employer which implicitly or explicitly communicates that an individual's right to continued employment is conditioned upon submission to unwelcomed sexual advances. When an individual of either gender reasonably perceives that he must abandon his employment to

escape unwelcome sexual harassment and verbal and physical sexual assault, he is the victim of employment discrimination based on sex as proscribed by Title VII. The sexually harassing nature of the defendant's conduct is determined through analysis of the facts and circumstances underlying the claim, and not by the gender of the defendant or his sexual preferences.

Lyons', Johnson's and Pippen's act of selecting Joseph Oncale to be the victim of their unwelcomed sexual advances is actionable under Title VII. Joseph Oncale, alone among the males in the work place, was forced to tolerate his direct supervisors' deviant sexual approaches as a condition of his employment. The harassment was sexual, it was unwelcomed, it altered the reasonable conditions of his employment and Joseph Oncale, an individual, belongs to a protected class. The record confirms that Lyons, Johnson, and Pippen said what they said and did what they did because Joseph Oncale was a male. They used sexual talk and activity to demean and humiliate him. They chose their words and conduct because Oncale was a man, knowing that such language and conduct would degrade him as a man. Their conduct was sexual in nature, offensive, unwelcome, and therefore actionable under Title VII.

To the extent the decision below and the Fifth Circuit's decision in *Garcia v. Elf Atochem North America, supra* act as a bar to a same-sex sexual harassment claim under Title VII they are inconsistent with the language, scope and purpose of applicable law as defined by the United States Supreme Court and must be set aside. There is no textual, historical, jurisprudential or logical basis for the Fifth Circuit's categorical rejection of same-

sex actions under Title VII. The plain language of Title VII neither commands nor supports the Fifth Circuit's interpretation of the law. The legislative history is silent and the authority found by the Fifth Circuit, to the limited extent rejection of Mr. Oncale's claim is explained in the light of published opinion, is unpersuasive on its face and inconsistent with the approach employed by the courts in addressing reverse discrimination and intra-class discrimination claims. The Fifth Circuit's position also conflicts with this Court's gender neutral, fact-driven analysis in *Meritor* and *Harris*. This Court should overturn the Fifth Circuit's absolute rejection of same-sex actions under Title VII and allow Joseph Oncale to proceed with his claims.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit's Categorical Rejection of Same-Sex Harassment Claims Is Inconsistent With the Plain, Unambiguous Language of Title VII.

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. Section 2000e-2(a)(1). This Court has interpreted the ban on sexual discrimination to include sexual harassment in the workplace. The sexual harassment proscribed includes both hostile or abusive environment claims as well as sexual conduct or activity which is directly linked to the grant or denial of an economic quid pro quo.

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986).

When interpreting a statute, a court must first look to the plain meaning of the statute's text rather than seek guidance from an extratextual source as an interpretative aid.[4] The United States Court of Appeals for the Seventh Circuit recently applied this well settled principle in *Doe v. City of Belleville, Illinois*, No. 94-3600, 1997 WL 400219 (7th Cir. July 17, 1997) and held, on facts very similar to those in the instant case, that same-sex sexual harassment is actionable under Title VII.

The text of Title VII is gender-neutral and does not remotely suggest that the particular gender of the harasser or victim is a dispositive consideration in a Title VII case.[5] The statute's text, as written, does not support exclusion of same-sex claims.[6] Nothing in the language of

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[4] See, generally, *Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501, 506 (1995) (the first step in statutory construction is reading the language of the statute). See, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (when a statute's text is clear on its face, the Court should not look to legislative history). See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), cited in *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (The starting point in every case involving construction of a statute is the language itself).

[5] As the Seventh Circuit stated: "Unless we read into the statute limitations that have no foundation in the broad, gender-neutral language that Congress employed, it is evident that anyone sexually harassed can pursue a claim under Title VII, no matter what her gender or that of her harasser." *Doe*, 1997 WL 400219, at page 9.

[6] See, generally, *EEOC v. Walden Book Company, Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995).

the statute suggests that Title VII coverage is limited to discrimination against an individual of one gender by a member of the other gender.[7]

The language of Title VII provides no support for the Fifth Circuit's absolute rejection of same-sex claims. Congress chose to use the unmodified word "sex" when referring to discrimination that is forbidden. This is a choice of an obviously gender-neutral term, just as Congress chose to prohibit discrimination based on "race" rather than discrimination against particular racial groups. Had Congress intended to prevent only different-sex sexual harassment, it could have used the term "member of the opposite sex." Congress did not do so.

Accordingly, on the basis of the unambiguous language of Title VII alone this Court should overrule the

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[7] The Seventh Circuit, rejecting the reasoning of the Fifth Circuit, stated as follows:

> The language of Title VII . . . does not purport to limit who may bring suit based on the sex of either the harasser or the person harassed.
>
> * * *
>
> It is, ultimately, the plain, unambiguous language of the statute upon which we must focus. . . . There is no ambiguity here. . . . [T]he words of Title VII suggest that anyone discriminated against 'because of' such individual's sex may bring suit, regardless of his gender or that of his harasser.

Doe v. City of Belleville, Illinois, No. 94-3699, 1997 WL 400219, at page 7-8 (7th Cir. July 17, 1997); see also *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir. 1996) stating that court discerned no basis in statute requiring that victim and harasser be of different sexes).

Fifth Circuit's categorical pronouncement that same-sex harassment is never actionable under Title VII. As many courts have recognized, the language of Title VII is broad enough to include same-sex sexual harassment claims. In a particular case in which same-sex sexual harassment is claimed, a court must determine, based on the facts of that case, if the harassment was or was not "because of sex." The Fifth Circuit's absolute bar of same-sex claims erects an artificial barrier, unsupported by the statutory language, to such an objective case-by-case analysis of the conduct involved.

II. The Legislative History of Title VII Neither Compels Nor Supports the Fifth Circuit's Summary Refusal to Recognize Same-Sex Sexual Harassment Claims.

As previously shown, resort to legislative history or other interpretive aids is neither necessary nor appropriate in this case. The explicit text of the statute requires reinstatement of the plaintiff's claims. However, even if inquiry into legislative history is called for, virtually no legislative history is available.[8] Congress provided no

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[8] Opponents of Title VII added the proscription against sex discrimination when the bill was on the floor of the House of Representatives as a last minute attempt to prevent Title VII from passing. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment.").

hint in the statute as to what it meant by the term "sex" and did not address the issue of sexual harassment. While debating whether to add the prohibition against discrimination based on sex, members of the House of Representatives, however, had a discussion confirming that Title VII would cover both men and women.[9]

Accordingly, the Fifth Circuit's rejection of same-gender sexual harassment claims rests upon unsupportable assumptions and proclamations as to the "underlying concerns" of Congress. When maintaining, as it does, that the conduct alleged by Mr. Oncale was not of the type Congress intended to prohibit when it enacted Title VII, the Fifth Circuit can cite nothing in support of this position because so little legislative history of the act exists regarding discrimination based on sex and because

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[9] House members had the following discussion:

Ms. Griffiths: I would like to ask the chairman of the committee on the judiciary, the gentlemen from New York, a question. Mr. Chairman is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?

Mr. Celler: This bill is all-embracing and will cover everybody in the United States.

Ms. Griffiths: It will cover every colored man and every colored woman?

Mr. Celler: Yes, it will cover white men and white women and all Americans.

110 Cong. Rec. 2578 (1964)

no legislative history specifically addresses sexual harassment.[10] There is simply nothing in the legislative history of Title VII which suggests that courts should not recognize, first, that the plaintiff's status as a protected individual cannot be defined or limited by the gender of the "employer" and, secondly, that the "because of sex" language does not provide a textual or historical basis for a flat pronouncement that same-sex sexual harassment claims are never actionable.[11] The legislative history of Title VII provides no justification for the position that the statute covers sexual harassment between members of opposite genders but not sexual harassment between those of the same gender. Further, the thin legislative history offers no basis for definition of a sexual harassment victim's right through consideration of the "employer's" gender.[12]

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[10] See, *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity).

[11] The Seventh Circuit observed as follows: "[T]o attribute to Congress an intent solely to strike at sexual harassment reflecting the historic exploitation of women by their male co-workers reads far more into legislative history that amounts to little more than a last ditch effort to scuttle the entire statute." *Doe*, 1997 WL 400219, at page 8.

[12] The awkwardness of reference to the "employer's" gender underscores the weakness of the Fifth Circuit's *Garcia/Oncale* rule. While the individual defendants' gender and sexual desires may be relevant to the inquiry, the "employer," the entity ultimately responsible under law, is without gender. Logically, thus, the sexual and harassing nature of the work place conduct must remain the focus.

Ironically, in spite of Congress' silence and the mischievous spirit in which the term "sex" was added at the eleventh hour, the Fifth Circuit's *Garcia/Oncale* approach is based upon a "plain meaning/Congressional intent" doctrine first suggested by the United States District Court for the Northern District of Illinois in *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). Without citation or analysis, the district court in *Goluszek* divined the intent of Congress and declared that "it (same-sex harassment) is not the type of conduct Congress intended to sanction when enacting Title VII."[13] Respectfully, this dismissive approach to the decision of sexual harassment claims, which has found quite a number of followers,[14] is deeply flawed and should be rejected by this Court. As discussed below, the *Golusk/Garcia/Oncale* appproach is inconsistent with this Court's inclusive approach to sexual harassment claims, its recognition of reverse discrimination and intra-class claims under Title VII and the interpretive guidelines embraced by the Equal Employment Opportunity Commission; all of which allow Joseph Oncale to proceed with his Title VII action.

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[13] *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988).

[14] Examples of the "plain meaning" basis for rejection of same gender harassment claims include *Mayo v. Kiewest Corporation*, 898 F. Supp. 335 (E.D. Va. 1995), affirmed, No. 95-2638, 1996 WL 460269 (4th Cir. August 15, 1996) and *Hopkins v. Baltimore Gas & Electric Company*, 871 F. Supp. 822 (D. Md. 1994), aff'd, 77 F.3d 745 (4th Cir.), cert denied, 117 S. Ct. 70 (1996).

III. Recognition of Same-Sex Claims Is Consistent With the Court's *Meritor* and *Harris* decisions

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) this Court recognized for the first time that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive working environment." *Meritor Savings Bank, supra* at 64-65. Following the lead of several circuit courts of appeal, the Supreme Court further held that "unwelcome sexual advances that create an offensive or hostile working environment" may form the basis of a claim of sex discrimination under Title VII. *Meritor Savings Bank*, supra at 64. For sexual harassment to be actionable, the Court reasoned, it "must be sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create a hostile or abusive work environment." *Meritor Savings Bank*, 477 U.S. at 67 citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

While *Meritor* did not address same-sex or "male-on-male" harassment, nothing in the Court's analysis of remedies suggests that Title VII is limited to heterosexual harassment. To the contrary, as this Court's definition of Title VII's scope is cast in gender neutral terms the proper focus is the nature and severity of the sexual misconduct and not the gender of the harasser and victim.[15] See, generally, *Sardinia v. Dellwood Foods, Inc.*, 69 Fair. Empl. Prac. Cas. 705 (S.D.N.Y. 1995).

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[15] No matter what the gender of the harasser or victim, the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcomed' " *Meritor*, 477 U.S. at 68, citing 29 C.F.R. Section 1604.11(a) (1993).

In 1980 the Equal Employment Opportunity Commission issued guidelines which define sexual harassment as discrimination based on sex within the meaning of Title VII. See, 29 C.F.R. Section 1604.11(a) (1993). More specifically, the EEOC defines sexual harassment as follows:

> "Unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

The guidelines issued by the EEOC, while not controlling, do by reason of their authority, constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance. See, *Meritor Savings Bank v. Vinson, supra.* and *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-42 (1976).[16] Considering Joseph

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[16] The views of the EEOC, the agency charged with enforcement of Title VII, have been particularly persuasive when considering the language and purpose of the statute. See, e.g., *Robinson v. Shell Oil Co.*, ___ U.S. ___, 117 S. Ct. 843, 848 (1997) (adopting EEOC's position that the anti-retaliation provision of Title VII covers former employees); *Walters v. Metropolitan Educational Enterprises*, ___ U.S. ___, 117 S. Ct. 660 (1997) (adopting the EEOC's "payroll method" of counting employees for purposes of coverage under Title VII).

Oncale's claims in light of the EEOC's interpretive guidelines he has stated a viable Title VII claim because submission to unwelcomed sexual advances became a condition for his continued employment with Sundowner Offshore. The actions of his supervisors created a sexually intimidating and offensive work environment in violation of law.[17]

An interpretation of Title VII which permits same-sex harassment claims is entirely consistent with The Court's embrace of the EEOC's guidelines and its statement in *Meritor Savings Bank v. Vinson,* 477 U.S. at 64 (1986) that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." The Fifth Circuit's flat rejection of Joseph Oncale's same-sex Title VII action cannot be reconciled with the Court's *Meritor* approach to sexual harassment claims under Title VII.

The *Garcia/Oncale* approach likewise conflicts with the gender-neutral approach embraced by the Eleventh Circuit's decision in *Henson v. City of Dundee,* 682 F.2d 897, 902

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[17] The EEOC Guidelines on Discrimination Because of Sex-Sexual Harassment, 29 C.F.R. § 1604.11(a) (1993), clearly state, "[h]arassment on the basis of sex is a violation of Section 703 of Title VII." Moreover, following from the principle that Title VII prohibits sex discrimination against both genders, it is well settled that both men and women can be sexual harassers as well as victims of sexual harassment. *See* EEOC Compl. Man. (CCH) § 615.2(b)(1) (1981) (instructing that "[a] man as well as a woman may be the victim of sexual harassment," and that "a woman as well as a man may be the harasser"). See also EEOC Decision No. 81-16, Empl. Prac. Dec. (CCH) (1981) ¶ 6756 at 4796-97 (allegation that male supervisor "made unwanted sexual advances" toward male subordinate states "a violation of Title VII" if substantiated).

(11th Cir. 1982) and cited approvingly in both the lead opinion in *Meritor* and Justice Scalia's concurring opinion in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Specifically, this Court in *Meritor*, 477 U.S. at 66-67 (1986) cited the Eleventh Circuit's statement in *Henson v. City of Dundee*, 682 F.2d 897, 902 (1982):

> "Surely, a requirement that **a man or a woman** run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (Emphasis added)

Thus the language, scope and purpose of Title VII require the conclusion that men, as well as women, can be victims of discrimination based on sex proscribed under Title VII. The "gauntlet of sexual abuse" which a worker need not tolerate as a condition of employment as a matter of logic and law must be said to include same-sex sexual abuse.

Under Title VII neither a man nor a woman can be required, as Joseph Oncale was required, to run a gauntlet of sexual abuse, as a condition of employment. To subject a selected individual to a sexually offensive and degrading environment as the price of walking in the door to go to work is to discriminate against that individual on the basis of sex. To require Joseph Oncale to endure the onslaught of sexually charged words and actions as a condition of his employment with Sundowner is to subject him to harassment based on sex. The gender of Mr. Oncale's harasser neither defines nor detracts from the sexually harassing nature of the defendants' conduct. To the contrary, one can assert with some

confidence that there is no type of conduct more repulsive to the nonconsenting heterosexual male and more certain to drive him from the work place than that engaged in by the defendants in this case. Why is such conduct so degrading and humiliating? Because Joseph Oncale is a man. The defendants targeted Joseph Oncale for harassing treatment and selected their method and manner of sexual harassment because he was a male and because of his sexual identity as a man, confident that Joseph Oncale would find the employment situation intolerable.[18]

The "evil" addressed through Title VII is more than gender-based denial of specific economic opportunities for women. Title VII prohibits conduct of an employer which communicates to an employee that he must tolerate unwelcome sexual abuse as a condition of continued employment. The Fifth Circuit's summary dismissal of Joseph Oncale's claims is at odds with this precept and this Court's analysis of the parameters of sexual discrimination in *Harris v. Forklift Systems*, Inc., 510 U.S. 17 (1993).

In *Harris* the Court was called upon to define a discriminatorily "abusive work environment." The Court plainly defined the scope of Title VII of the Civil Rights

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[18] As the Seventh Circuit explained in its recent decision recognizing same-sex sexual harassment, gender becomes "inextricably intertwined with the harassment," *Doe*, 1997 WL 400219, at page 13, and the harassers chose the conduct "With just this likelihood in mind – that is, that their intent was to humiliate him as a man." Id. at page 15.

Act of 1964 in gender-neutral terms: "Title VII bars conduct that would seriously affect *a reasonable person's* psychological well-being." (Emphasis added). *Harris*, 510 U.S. at 21-22 (1993). Where the environment would be reasonably perceived, and is perceived, as hostile or abusive, the "individual," "reasonable person" or "victim", be he male or female, is entitled to pursue the remedies afforded through Title VII. *Harris, supra.*[19] The gender of the harasser does not limit or define the reasonableness of the victim's perceptions.

In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit reviewed a hostile environment sexual harassment action brought by a female employee of the Internal Revenue Service and held:

> " . . . a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Then, in an important footnote which foreshadowed the "reasonable person" standard adopted in *Harris*, the Ninth Circuit stated:

> "Of course, where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's

[19] As the record below establishes, Mr. Oncale would and did find the circumstances of his employment situation hostile and sexually abusive.

> perspective would be that of a reasonable man." *Ellison*, 924 F.2d at 879, n.11.

Given this language and this Court's adoption of a "reasonable person" approach to analysis of sexual harassment claims, it must be determined that Joseph Oncale has complained of sexual harassment (defined by the EEOC as "unwelcomed sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature," see, 29 C.F.R. Section 1604.11(a) (1993)) which the reasonable man could consider sufficiently severe to alter the conditions of his employment and create an abusive work environment. He is entitled to the full protections of Title VII.

This Court has twice recognized the broad purpose of the statute in proscribing sexual harassment. In *Meritor*, this Court stated that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.[20] This Court noted further in *Harris* that the "very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of work place and quality."[21] In both *Meritor* and *Harris* the Court found the important factors for proving a claim for sexual harassment to be the unwelcome nature of the advances and the effect of the harassment on the victim. As the Court stated in *Meritor* 477 U.S. 57, 68 (1996), "the gravamen" of any sexual harassment claim is that the alleged sexual advances are

[20] *Meritor*, 477 U.S. at 68.

[21] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993)

"unwelcome." Whether an environment is "hostile" or "abusive," must be considered and determined only through evaluation of all the circumstances and the conduct of the individuals involved. The relevant circumstances, the Court noted, may include frequency of the discriminatory conduct; the severity, whether it was physically threatening or humiliating, or mere offensive utterance; whether it unreasonably interfered with an employee's work performance as weighed and considered through the reasonable perceptions of the victim.[22] Nothing in this broad-based analysis of a Title VII claim suggests, much less requires, categorical rejection of same-gender sexual harassment claims. Further, nothing in this analytical framework requires proof of an "anti-male" or "anti-female" environment or immersion of the trial court into the dark waters of an individual plaintiff's or defendant's sexual orientation, preferences or needs.

Under this Court's approach in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems*, courts must evaluate claims of sexual harassment in individual cases and determine whether the claims are actionable. Indeed, that is why the Court articulated factors in *Harris* that were illustrative of the circumstances that could be considered. *Harris*, 510 U.S. at 24.[23]

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[22] *Harris*, 510 U.S. at 23.

[23] *Harris*, 510 U.S. at 24 (Scalia, J., concurring) ("One of the factors mentioned in the Court's non-exhaustive list – whether the conduct unreasonably interferes with an employee's work performance – would, if it were made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute.").

In view of this Court's analysis of hostile environment sexual harassment, it should be clear that conduct such as that at issue in this case is "because of . . . sex." The Seventh Circuit, evaluating conduct very similar to that in this case, explained that plaintiffs must demonstrate the nexus between the harassing conduct and sex when the conduct is devoid of sexual content. *Doe v. City of Belleville, Illinois*, No. 94-3600, 1997 WL 400219 (7th Cir. July 17, 1997). However, where the conduct had "explicit sexual overtones," *Doe*, at *11, the court explained that "the content of that harassment in and of itself demonstrates the nexus to the plaintiff's gender that Title VII requires." Id. In this case, as in *Doe*, the explicit sexual language and conduct speaks for itself in establishing a nexus between the harassment and sex.

IV. Same-Sex Sexual Harassment Claims Are Merely a Type of Intra-Class Discrimination Claims, which Are Clearly Recognized Under Title VII and Other Federal Discrimination Laws

The Fifth Circuit's summary dismissal of Mr. Oncale's claims based upon the gender of the plaintiff and defendants assumes the harassment must discriminatorily affect a protected group in its entirety rather than simply the individual plaintiff in order to be actionable under Title VII. The Fifth Circuit's assumptions are erroneous and, again, contrary to the explicit terms of the statute. It is not essential to a Title VII cause of action that the discriminatory treatment be directed towards all

members of the group at issue.[24] Title VII's protections apply to "individuals."

Courts once interpreted Title VII to cover only members of minorities, non whites, because whites were "at all times a member of the majority, a member of the 'dominant' race."[25] This court has rejected this rationale, finding instead that Title VII prohibits any racial discrimination, irrespective of the race suffering discrimination.[26] Similarly, the neutrality of the term "sex" considered in light of the court's approach to intra-class and "reverse" discrimination fact patterns requires recognition of the same-sex cause of action. If the facts as pled and established at trial reveal that an employer singles out a member of his sex to harass sexually, that employer discriminates on the basis of sex.

Indeed, this Court in the context of discrimination actions under Title VII has focused its attention on the individual in determining whether discrimination has occurred. In *Connecticut v. Teal* this Court declared that Congress never intended to give an employee license to discriminate against some employees on the basis of race or sex merely because the employer treats other members

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[24] See generally, *Connecticut v. Teal*, 457 U.S. 440 (1982); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

[25] See, generally *Prescott v. The Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1548 (N.D. Ala. 1995).

[26] *McDonald v. Santa Fe Trail Transportation, Company*, 427 U.S. 273, 278-79 (1976) (Stating that Title VII's coverage is "not limited to discrimination against members of any particular race.").

in the employee's groups favorably.[27] In *Los Angeles Department of Water and Power v. Manhart*, the Court recognized that fairness to a class of women employees as a whole does not justify unfairness to an individual female employee. In so holding, the Court found Title VII's focus on the individual to be unambiguous.[28]

The Fifth Circuit's declaration that a defendant employer can not discriminate against a member of his or her own gender group is without foundation and inconsistent with recognition of intra-class discrimination claims.[29] This Court and many lower courts have recognized on many occasions the possibility and actuality of intra-class harassment and discrimination. Simply stated, membership in a particular protected class does not, in fact, preclude the possibility that an individual will discriminate against members of that same class based on their membership in that class. Case law outside the realm of sexual harassment recognizes the existence of intra-group discrimination. The Court held in *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) that it could not be presumed as a matter of law that individuals of one

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[27] *Connecticut v. Teal*, 457 U.S. 440, 445 (1982).

[28] *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. at 708 (1978).

[29] Again, the exact foundation for the Fifth Circuit's approach is unclear. Fair review of the court's *Garcia* and *Oncale* decisions does not reveal fully which of the noted approaches to summary dismissal of same-sex sexual harassment claims, generally labeled the "plain meaning," "not the type of conduct/Congressional intent," "anti-male or dominant male environment," and, to a lesser extent, the "but for" approaches, has been embraced by the Fifth Circuit.

definable group will not discriminate against other members within their group. This approach is reflected across the spectrum of discrimination claims. For example, the District Court in *Hansborough v. City of Elkhart Parks & Recreation Department*, 802 F. Supp. 199 (N.D. Ind. 1992) held that discrimination by an African-American against another African-American because of race violates Title VII. In *Walter v. Secretary of Treasury*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989) the District Court noted in a Title VII action it is "not controlling that . . . a black person is suing a black person." Further, in *Franceschi v. Hyatt Corporation*, 782 F. Supp. 712 (D.P.R. 1992) the District Court found discrimination by one Puerto Rican against another Puerto Rican actionable under a related statute, 42 U.S.C. Section 1981.

Harassers can and do harass members of their own class. This Court recognized in a recent opinion that intra-class discrimination exists in that one may discriminate against a member of one's own "class" and may do so with reference to a single member of the protected class, treating all other members fairly. *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 116 S. Ct. 1307 (1996). In *O'Connor*, the Court held that a plaintiff asserting an ADEA claim is not required, as part of his prima facie case, to prove that he was replaced by someone outside the protected class. In rejecting such a requirement, the Court stated that "the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires *'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .'* " *Id.*, 116 S. Ct at

1310 (quoting *Teamsters v. United States*, 431 U.S. 324 (1977)). So too in the same-sex sexual harassment context there is no reason for adding the arbitrary factor that the harasser be of a different sex than the victim.[30]

V. The Proper Focus Is the Sexual Nature and the "Unwelcomeness" of the Harassment.

As this Court has stated, "the gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcomed." *Meritor Savings Bank v. Vinson*, 477 U.S. at 57. The plaintiff must show tnat he or she perceives the conduct as undesirable or offensive and that it was not solicited or invited.[31] The gender of the harasser defines neither the sexual nature of the advances nor the victim's perceptions thereof.

Unwelcomed sexual advances, ridicule, intimidation and other harassing acts are no less injurious and degrading to someone of the harasser's same gender than they are to an individual of the opposite gender. Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to

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[30] *Doe v. City of Belleville, Illinois*, No. 94-3699, 1997 WL 400219, at *21 (7th Cir. July 17, 1997) ("*O'Connor* . . . make[s] clear that we must not permit the viability of a discrimination claim to turn on arbitrary factors that do not capture the universe of actionable discrimination. We are convinced that the sexual orientation of the person who sexually harasses his co-worker is just such an arbitrary factor.").

[31] See generally, *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986)

be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must work in a closely confined work space on the Outer Continental Shelf of the United States?[32] Title VII is aimed at the consequences of an employment practice rather than a particular motivation of supervisors or coworkers.[33] The factors set forth by the Court in *Harris v. Forklift Systems, Inc.* for determining the existence of a hostile environment sexual harassment claim make no reference to the gender of the victim in relation to the harasser.[34] Instead, this Court in *Harris* focused exclusively on the circumstances surrounding the harassing conduct and the effect it had on the victim. This analytical approach should be employed in the same-gender sexual harassment claims. And if employed the required conclusion at this stage of the litigation is that Joseph Oncale was harassed "because of" his gender. Based on the record the trial court reasonably could determine that Sundowners' supervisory personnel intended their remarks, actions and physical assault to demean Joseph Oncale by insulting and threatening his sexual prowess and sexual existence.[35]

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[32] As the Seventh Circuit explained, "[t]he experience was still humiliating in a deeply personal way, as only sexual acts can be." *Doe v. City of Belleville, Illinois*, No. 94-3699, 1997 WL 400219, at page 15 (7th Cir. July 17, 1997). Indeed, the Seventh Circuit characterized such conduct as humiliating the victim "as a man." Id. At page 15.

[33] *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir, 1991).

[34] *Harris v. Forklift Systems, Inc.*, 510 U.S. at 23 (1993).

[35] See, *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993).

Meritor does not require, or even suggest, that a hostile environment analysis must include consideration of the sexual orientation of the parties. Rather, the Court's factual inquiry focuses upon the conduct at issue. Under the Court's analysis a claim is stated if the harassment, judged by the objective conduct involved, is sexual and "sufficiently, severe or pervasive" to alter the "terms, conditions or privileges" of the victim's employment by creating an environment hostile to him because of his sexual existence. Earnest sexual solicitation and outrageous sexual abuse as alleged in Joseph Oncale's complaint provide a firm basis for the inference that Joseph Oncale was harassed in violation of Title VII.[36]

Additionally, there is no sexual gratification element necessary to a Title VII claim and none can be inferred from the approach adopted by this Court.[37] Characterizing same-gender sexual harassment as "homosexual" harassment suggests the need to prove an individual's sexual preference in a court of law. Such a superlative inquiry is unnecessarily complicated and intrusive and

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[36] Consider: *Tietgen v. Brown Westminister Motors*, 921 F. Supp. 1495, 1502 (E.D. Va. 1996) ("if [Oncale] can show by preponderance of the evidence that (his harasser) did indeed solicit or demand sexual acts from him, the jury may properly infer that (the alleged harasser) did so because of the plaintiff's sex within the meaning of Title VII.

[37] See *Martin v. Northfolk Southern Railway Company* 926 F. Supp. 1044 (N.D. Ala. 1996) (Court erroneously presumed that hostile environment sexual harassment is actionable only when harassment conduct is predicated upon the harasser's need for sexual gratification from the victim)

wholly inconsistent with the language, scope and purpose of Title VII. In the "traditional harassment" cases where the alleged harassment involves a male harassing a female victim, the trial court does not consider the male's assumed heterosexuality. Such an inquiry is equally irrelevant and inappropriate in the context of a same-sex sexual harassment action. In addition, inquiring into the sexual orientation of the harasser would contribute little to determination because victimization is not necessarily motivated by attraction. More commonly, harassment involves issues of power and control on the part of the harasser.[38]

VI. The Fifth Circuit's Approach Leads to Untenable Results With the Gender of the Harasser Determining Whether the Victim Has Redress for Harassment

Acceptance of the Fifth Circuit's absolute rejection of same-sex sexual harassment claims works illogical results. Sexual harassment by a supervisor of the same sex can be exaction of a condition of employment which, but for his or her sex, an employee would not have faced. Common experience requires the conclusion that there is no fundamental distinction to be drawn between the paradigm case of harassment involving a heterosexual

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[38] See generally, Catharine A. MacKinnon, The Sexual Harassment of Working Women 1 (1979) ("Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power.")

male and a female victim and the same-sex sexual harassment case.[39]

The absurd circumstances which acceptance of the *Garcia/Oncale* rule would create are underscored by the United States District Court for the Eastern District of Louisiana in the matter of *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). In *Pritchett*, the plaintiff filed an action against her former employer alleging that she was sexually harassed by her female supervisor in violation of Title VII. Dismissing the defense motion for summary judgment, the Court reasoned that it seemed discriminatory that a supervisor should be exempted from a Title VII sexual harassment claim solely because of that supervisor's sexual origination or the gender of his victim. As the Court in *Pritchett* put it, "to conclude that same-gender harassment is not actionable under Title VII is to exempt homosexuals from the very laws governing the work place conduct of heterosexuals." *Pritchett v. Sizeler Real Estate Management Company*, No. Civ. A. 93-2351, 1995 WL 241855 (E.D. La. April 25, 1995). Certainly, the clear language, broad scope and defined purpose of Title VII, as articulated by this Court, do not support such an exemption.[40] Sexual harassment is no less "because of sex" when it involves a female harassing

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[39] Consider, *Fredette v. BVP Management Associates*, No. 95-3242, 1997 WL 228588 (May 22, 1997)

[40] See generally, Catharine A. MacKinnon, The Sexual Harassment of Working Women 206 (1979) ("A woman who is fired because of her refusal to submit to a lesbian supervisor is just as fired – and her firing is just as related to her sex – as if the perpetrator were a man.").

a subordinate male or a superior of either gender harassing a subordinate of the same sex.[41]

Meritor reflects the Court's recognition that both men and women can be the victims of sexual harassment.[42] This Court has stated that Congress intended Title VII "to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor,* at 64. There is no evidence that Congress intended Title VII to apply to only one sex, one race, one color, one religion or one national origin. There is no suggestion in the opinions of this Court that the gender of the harasser and not the nature and impact of his or her conduct is determinative.

CONCLUSION

When a male supervisor propositions or harasses a selected male subordinate and conditions the subordinate's continued employment upon submission to that supervisor's sexual whim the subordinate has been discriminated against "based on sex." The Court should find the violent and vulgar sexual harassment endured by Joseph Oncale to be actionable under Title VII. John Lyons, Danny Pippen and Brandon Johnson, with the acquiescence of their superiors, required sexual favors

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41 *Id.*

42 *Griffith v. Keystone Steel & Wire,* 887 F. Supp. 1133, 1136 (C.D. Ill. 1995); *King v. M. R. Brown, Inc.,* 911 F. Supp. 161, 167 (E.D. Pa. 1995) (Conclusion that same-sex harassment is not actionable is "weakened by the Supreme Court's implicit acknowledgment that both men and women can be victims of sexual harassment").

and submission to sexual assault as a condition to Mr. Oncale's continued employment. The treatment Joseph Oncale received certainly constitutes sexual discrimination as defined by the EEOC and the Court.

The Fifth Circuit's categorical rejection of same-gender harassment claims is based either upon a faulty "plain language approach" or an insupportable requirement that the victim of sexual harassment established that the work place was "anti-male" or "anti-female" as the case may be. Or perhaps it is a reaction to the court's understandable hesitancy to address same-gender sexual harassment claims if, as an element of proof or an essential element of the claim, the defendant's sexual preferences and practices must be laid bare before the trier of fact. Whichever concern underlies the Fifth Circuit's rejection of Mr. Oncale's claim, and indeed this is a matter of speculation as the Fifth Circuit offers few clues as to its true concerns, the ultimate result, flat rejection of same-gender harassment claims, is unfounded. The language of Title VII does not allow for blanket exclusion of the claims. Indeed, it requires that they be heard. In response to a same-sex claim the trial court can continue to engage in the accepted process of decision: Examine the "employer's" conduct to determine whether it is sexual, unwelcomed and of a nature or design to sexually demean, humiliate, harass or intimidate the plaintiff. Examine the objective and subjective severity of the conduct and consider its impact upon the victim.

This Court has recognized sexual harassment as a separate and viable cause of action; a form of sex discrimination as actionable as discrimination claims arising out of traditional economic inequalities between men and

women in the work place. Recognition of same-sex sexual harassment claims is entirely consistent with, if not suggested by, existing precepts. A same-sex sexual harassment action does not present novel or difficult questions for the trier of fact and can be determined within the framework of established requirements of the cause of action. The courts will have to consider, as they do in the traditional harassment scenario, the conduct of the defendants, the sexual nature of the conduct, its offensiveness and "welcomeness" and whether it altered the reasonable terms and condition's of the victim's employment. Certainly for purposes of the defendants' summary judgment motion these elements appear to have been met. Joseph Oncale must be allowed to proceed with his claims.

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